

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JIHAD THAIFF MONSOUR,

Petitioner,

vs.

GREG SMITH, *et al.*,

Respondents.

3:11-cv-00156-LRH-VPC

ORDER

This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by a Nevada state prisoner. Before the Court is respondents' motion to dismiss. (ECF No. 8).

I. Procedural History

A criminal complaint was filed on August 5, 2004, charging petitioner with one count of sexual assault with a deadly weapon, one count of sexual assault, and one count of assault with a deadly weapon. (Exhibit 2).¹ The justice court ordered a competency evaluation of petitioner. (Exhibit 3). In the Second Judicial District Court, in the County of Washoe, for the State of Nevada, petitioner was found competent to stand trial. (Exhibit 8). The State filed an information charging petitioner with the same three counts listed in the criminal complaint. (Exhibit 11).

On August 30, 2006, after a three-day jury trial, petitioner was found guilty of sexual assault with a deadly weapon (Count I), sexual assault (Count II), and assault with a deadly weapon (Count III). (Exhibit 27). The state district court sentenced petitioner on October 25, 2006, to three

¹ The exhibits referenced in this order are found in the Court's record at ECF Nos. 9-11.

1 consecutive life sentences on Counts I and II, and an additional consecutive term of 28-72 months on
2 Count III. (Exhibit 31). Petitioner filed a timely notice of appeal. (Exhibit 33). The Nevada
3 Supreme Court affirmed petitioner's conviction, but granted him a new sentencing hearing because
4 the state district court judge's comments during the sentencing hearing "indicate[d] that the judge's
5 impartiality was compromised." (Exhibit 49, at p. 7). The Nevada Supreme Court vacated the
6 sentence and remanded the case to state district court for a new sentencing hearing. (Exhibit 49).

7 On remand, the state district court randomly reassigned the case to a different state court
8 judge for sentencing. (Exhibits 50-52). At a hearing on October 8, 2008, the state district court re-
9 sentenced petitioner to three consecutive life sentences with the possibility of parole beginning at ten
10 years on Counts I² and II, and an additional term of 28-72 months on Count III, to run concurrent to
11 the life terms imposed in Counts I and II. (Exhibits 62 & 64). Petitioner did not file a direct appeal
12 of his new sentencing.

13 On December 31, 2009, petitioner filed a post-conviction habeas petition in the state district
14 court. (Exhibit 69). The State moved to dismiss the petition. (Exhibit 77). After briefing of the
15 State's motion to dismiss, the state district court held a hearing on the issue of timeliness under NRS
16 34.726, and ultimately dismissed the petition as untimely. (Exhibits 77, 80, 81, 90-91, & 94).
17 Petitioner filed a notice of appeal. (Exhibit 95). Petitioner's appeal from the dismissal of his state
18 habeas petition is currently pending before the Nevada Supreme Court, at Case No. 58148.

19 Petitioner dispatched his federal habeas petition to this Court on February 28, 2011. (ECF
20 No. 4). Petitioner raises ten grounds for relief in the federal petition. (*Id.*).

21 **II. Discussion**

22 Respondents move to dismiss the federal habeas petition because it is untimely under the
23 AEDPA statute of limitations. Respondents raise additional bases for dismissal, however, the Court
24 finds that the untimeliness of the federal petition is dispositive in this case.

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27 ² Count I resulted in two consecutive life sentences with the possibility of parole beginning at
ten years – one life term was for the underlying substantive offense and one life term was for the deadly
weapon enhancement.

1 The Antiterrorism and Effective Death Penalty Act (AEDPA) amended the statutes
 2 controlling federal habeas corpus practice to include a one-year statute of limitations on the filing of
 3 federal habeas corpus petitions. With respect to the statute of limitations, the habeas corpus statute
 4 provides:

5 (d)(1) A 1-year period of limitation shall apply to an application
 6 for a writ of habeas corpus by a person in custody pursuant to the
 7 judgment of a State court. The limitation period shall run from
 the latest of—

8 (A) the date on which the judgment became final by the
 9 conclusion of direct review or the expiration of the time
 for seeking such review;

10 (B) the date on which the impediment to filing an
 11 application created by State action in violation of the
 Constitution or laws of the United States is removed, if the
 applicant was prevented from filing by such State action;

12 (C) the date on which the constitutional right asserted was
 13 initially recognized by the Supreme Court, if the right has
 been newly recognized by the Supreme Court and made
 retroactively applicable to cases on collateral review; or

14 (D) the date on which the factual predicate of the claim or
 15 claims presented could have been discovered through the
 exercise of due diligence.

16 (2) The time during which a properly filed application for State
 17 post-conviction or other collateral review with respect to the
 18 pertinent judgment or claim is pending shall not be counted
 toward any period of limitations under this subsection.

19 28 U.S.C. § 2244(d).

20 A criminal defendant in Nevada has thirty days from the entry of judgment to file his notice
 21 of appeal. Nev. R. App. P. 4(b). If the defendant does not seek direct review from the highest state
 22 court, the conviction becomes final when the time for seeking such review elapses. 28 U.S.C. §
 23 2244(d)(1)(A); *Hemmerle v. Schriro*, 495 F.3d 1069, 1073-74 (9th Cir. 2007); *Wixom v. Washington*,
 24 264 F.3d 894, 898 (9th Cir. 2001). Once the judgment of conviction is final, the defendant has 365
 25 days to file a federal habeas petition. 28 U.S.C. § 2244(d).

26 In the present case, the judgment of conviction following petitioner's re-sentencing was
 27 entered on October 22, 2008. (Exhibit 64). The time for directly appealing the judgment of

conviction upon re-sentencing expired on November 22, 2008. Petitioner would have needed to file his federal petition by November 22, 2009. Petitioner filed his federal habeas petition in this Court on February 28, 2011.³ (ECF No. 4, at p. 1). As such, the federal petition is untimely by over 15 months. Further, the Court notes that petitioner did not file his state habeas petition challenging his re-sentencing until December 31, 2009, which was 39 days after the expiration of the AEDPA's statute of limitations. (Exhibit 69). An application for state post-conviction relief does not toll the AEDPA statute of limitations where the petitioner files it after the AEDPA statute of limitations has expired. *Jimenez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001).

The United States Supreme Court has held that the AEDPA's statute of limitations "is subject to equitable tolling in appropriate cases." *Holland v. Florida*, 130 S.Ct. 2549, 2560 (2010). The Supreme Court reiterated that "a petitioner is entitled to equitable tolling only if he shows: '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland*, 130 S.Ct. at 2562 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). In making a determination on equitable tolling, courts must "exercise judgment in light of prior precedent, but with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case." *Holland*, 130 S.Ct. at 2563. In the instant case, petitioner has failed to make any showing that he pursued his rights diligently and that any extraordinary circumstance prevented him from filing a timely federal petition. Petitioner is not entitled to equitable tolling and the petition must be dismissed as untimely.

III. Certificate of Appealability

In order to proceed with an appeal, petitioner must receive a certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a petitioner must make "a substantial showing of the denial of a constitutional right" to warrant a

³ The federal petition indicates that petitioner mailed his petition on February 28, 2011. (ECF No. 4, at p. 1). Pursuant to the "mailbox rule," federal courts deem the filing date of a document as the date that it was given to prison officials for mailing. *Houston v. Lack*, 487 U.S. 266, 270 (1988).

1 certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84
2 (2000). “The petitioner must demonstrate that reasonable jurists would find the district court’s
3 assessment of the constitutional claims debatable or wrong.” *Id.* (quoting *Slack*, 529 U.S. at 484). In
4 order to meet this threshold inquiry, the petitioner has the burden of demonstrating that the issues are
5 debatable among jurists of reason; that a court could resolve the issues differently; or that the
6 questions are adequate to deserve encouragement to proceed further. *Id.* This Court has considered
7 the issues raised by petitioner, with respect to whether they satisfy the standard for issuance of a
8 certificate of appealability, and determines that none meet that standard. The Court will therefore
9 deny petitioner a certificate of appealability.

10 **IV. Conclusion**

11 **IT IS THEREFORE ORDERED** that respondents’ motion to dismiss (ECF No. 8) is
12 **GRANTED** and the federal petition for a writ of habeas corpus is **DISMISSED WITH**
13 **PREJUDICE.**

14 **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF**
15 **APPEALABILITY.**

16 **IT IS FURTHER ORDERED** that the Clerk **SHALL ENTER JUDGMENT**
17 **ACCORDINGLY.**

18 Dated this 29th day of November, 2011.



21 LARRY R. HICKS
22 UNITED STATES DISTRICT JUDGE
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